STATE OF MICHIGAN
SUPREME COURT

CHANCE LOWERY,

Plaintiff-Appellee,

vs.

ENBRIDGE ENERGY, LIMITED PARTNERSHIP and ENBRIDGE ENERGY PARTNERS, L.P.,

Defendants/Appellants.
/

Supreme Court No. 151600

Court of Appeals No. 319199

Calhoun County Circuit Court No. 2011-003414-NO

AMICUS CURIAE BRIEF OF MICHIGAN CHAMBER OF COMMERCE

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QUESTIONS PRESENTED FOR REVIEW

1. Is a plaintiff in a toxic tort case required to present expert testimony regarding general and specific causation when the characteristics of the toxic substances at issue and their effects on that specific plaintiff are outside of the common understanding of a lay juror such that a judgment in the case would be based on impermissible guess work?

   Plaintiff/Appellee answers: No.
   Defendant/Appellant answers: Yes.
   The Chamber answers: Yes.
   The Court of Appeals answered: No.

2. Did Plaintiff sufficiently establish causation to survive Defendants' motion for summary disposition under MCR 2.116(C)(10), when Plaintiff's proffered witness had no expertise regarding the medical effects of exposure to toxic chemicals, admitted that he did not "really understand toxicology," failed to consider alternative causes of Plaintiff's alleged injuries, and presented no evidence that Plaintiff was actually exposed to any toxic substances?

   Plaintiff/Appellee answers: Yes.
   Defendant/Appellant answers: No.
   The Chamber answers: No.
   The Court of Appeals answered: Yes.

STATEMENT OF INTEREST OF *AMICUS CURIAE* MICHIGAN CHAMBER OF COMMERCE

Amicus curiae Michigan Chamber of Commerce (the "Chamber") submits this brief to the Michigan Supreme Court in *Lowery v Enbridge Energy, LP*, Supreme Court Case No. 151600. The Chamber is a nonprofit corporation that represents more than 6,800 private enterprises that are engaged in various professional, civic, commercial, and industrial activities. Since its founding in 1959, the Chamber has advocated for developments in law and public policy that enhance Michigan's economy and make Michigan a desirable place in which to live, work, and start a business. To further this objective, the Chamber frequently participates in lawsuits as *amicus curiae* to ensure that courts understand the impact of judicial decisions on economic development and how business is conducted in Michigan.

In this case, the trial court granted Defendants' motion for summary disposition, ruling that Plaintiff failed to present sufficient evidence of causation. The Court of Appeals majority reversed that decision and reinstated Plaintiffs' case. The Chamber believes that the Court of Appeals' majority opinion, which held that that a plaintiff in a toxic tort case does not need to present expert witness testimony to establish general and specific causation, will result in considerable uncertainty for corporations doing business in Michigan, as well as entities evaluating whether to do business in Michigan. The Chamber is further concerned that the Court of Appeals' opinion will allow future plaintiffs in toxic tort cases to establish causation without providing evidence sufficient to prove a causal link between their alleged injuries and defendants' alleged acts.

Because this jurisprudentially significant issue is likely to arise in cases throughout the state, the Chamber respectfully requests that the Court reverse the Court of Appeals opinion and reinstate the trial court's decision granting summary disposition in favor of Defendants. The

Court should hold that in toxic tort cases, when the issue of causation is, as here, so complex as to be outside of the common understanding of lay jurors, expert testimony is required to established general and specific causation.

I. INTRODUCTION

This case presents an issue of significant importance to Michigan jurisprudence that remains unresolved by this Court: whether expert testimony is required to establish causation in a toxic tort case. The answer to that question is "yes," not based on a new interpretation of, or sea change in, the law, but rather on a logical and necessary extension of decades-old precedent and common sense. The Court of Appeals first grappled with requisite level of testimony needed to establish causation in *Genna v Jackson*, 286 Mich App 413; 781 NW2d 124 (2009), where it "decline[d] to adopt" a per se rule requiring expert testimony in toxic tort cases. *Id*. at 418. But *Genna* presented markedly different circumstances than this case, and based on those circumstances where causation was readily apparent, made perfect sense at the time.

This case is not *Genna*. Nor are most toxic tort cases; they frequently involve complex questions of toxicology, science, chemistry, medicine, and other disciplines outside the common understanding of a lay juror. And where those questions persist, Michigan law has long been clear that expert testimony is required to establish causation when a matter is "not within the common experience and understanding of jurors." See, e.g., *Krohn v Home-Owners Ins Co*, 490 Mich 145, 167 n 59; 802 NW2d 281 (2011). This rule should be applied in toxic tort cases as well.

On July 26, 2010, a leak on Defendants' 6B oil pipeline in Marshall, Michigan released oil that eventually reached the Kalamazoo River. Plaintiff, who lived more than 10 miles from the oil release site, claims that he was exposed to volatile organic compounds ("VOCs") in the oil, which allegedly caused headaches, nausea, and vomiting that ultimately led to the rupture of his gastric artery. Yet by his own admissions, he did not experience these symptoms until three weeks after the oil leak and more than a week after the alleged oil odor had dissipated.

In the trial court, Plaintiff presented the testimony of his family physician who acknowledged that he had no toxicology or vascular medicine experience to support his theory that the oil leak caused Plaintiffs' injuries. Nor did Plaintiffs' doctor know anything about Plaintiffs' exposure to the oil leak or other chemicals—in fact, Plaintiffs' doctor attempted to explain that Plaintiffs' injuries were caused by Defendants' leak without ever examining Plaintiff at all. In response to this inherently unreliable testimony, the trial court granted Defendants' motion for summary disposition, recognizing that Plaintiff had failed to establish causation. But in a split decision, the Court of Appeals reversed that decision, even after opining that Plaintiffs' doctor's testimony was "inadequate" to establish causation. The Court of Appeals relied on *Genna*'s holding that expert testimony was unnecessary because there was a sufficient logical sequence of cause and effect on which a jury could conclude that Defendants' leak could have caused Plaintiffs' injuries.

Judge Jansen, writing in dissent, would have held that Plaintiff's theory of causation was too attenuated and that Plaintiff needed to present expert testimony to survive Defendants' motion for summary disposition. Judge Jansen had it right: as federal and state courts have recognized across the country, expert testimony is required to establish causation in toxic tort cases because the link between exposure to toxic substances and alleged injuries is outside the common understanding of a jury. Michigan should do the same; as a predicate to surviving a motion for summary disposition, plaintiffs should be required to present expert testimony establishing general and specific causation. Because Plaintiff failed to present that testimony in this case, the Court should reverse the Court of Appeals decision and reinstate the trial court's grant of summary disposition in favor of Defendants.

II. FACTUAL AND PROCEDURAL BACKGROUND

The Chamber adopts the factual and procedural background set forth in Defendants/Appellants' Brief on Appeal.

III. STANDARD OF REVIEW

The Chamber adopts the standard of review set forth in Defendants/Appellants' Brief on Appeal.

IV. ARGUMENT

A. The Court Should Hold that Plaintiffs in Toxic Tort Cases Must Present Expert Testimony to Establish Causation Where the Causal Link between the Alleged Harm and Injury Is Beyond the Common Understanding of a Juror

Toxic tort cases are a subset of general negligence claims. To establish a prima facie case for a tort, a plaintiff must present evidence of a: (1) legal duty owed by the defendant to the plaintiff, (2) the defendant's breach of that duty, (3) that defendant's breach caused the plaintiff's injury, (4) and that the plaintiff was damaged as a result. See *Lorencz v Ford Motor Co*, 439 Mich 370, 375; 483 NW2d 844 (1992). This case concerns the third element of causation.

To prevail in a tort action, a plaintiff must meet the significant burden of showing that the defendant's alleged negligence was a proximate cause of her injury. *Latham by Perry v Nat'l Car Rental Sys, Inc*, 239 Mich App 330, 340; 608 NW2d 66 (2000). A plaintiff must demonstrate as a threshold matter that there is "more than a mere possibility" that the defendant caused the injury. *Skinner v Square D Co*, 445 Mich 153, 166; 516 NW2d 475 (1994). A plaintiff must then also present "substantial evidence" from which a jury could conclude that, more likely than not, "but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Weymers v Khera*, 454 Mich 639, 647-648; 563 NW2d 647 (1997). That substantial evidence "must exclude other reasonable hypotheses with a fair amount of certainty" because a jury cannot be

permitted to merely guess about causation. *Skinner*, 445 Mich at 166, 174. A substantial safeguard against this prohibited guesswork is the requirement of expert testimony to prove causation.

With these axiomatic principles as a backdrop, Michigan law already suggests that expert testimony is required in toxic tort cases—expert testimony is required in similar cases where complex science and the relationship between a triggering event and an alleged injury are outside of a lay juror's common knowledge. Most notably, this occurs in medical malpractice cases. See *Lindley v City of Detroit*, 131 Mich 8, 10; 90 NW 665 (1902) ("Ordinarily, the testimony of experts is required to determine the cause of physical ailments."); *Woodard v Custer*, 473 Mich 1, 9; 702 NW2d 525 (2005) (requiring expert testimony regarding the cause of a leg injury because the intricacies of placing an arterial line and catheter in an infant was outside "the common understanding of the jury"). Indeed, the Court of Appeals has previously remarked that where causation inquiries are scientific in nature, the law must look to science for explanation. See *Nelson v American Sterilizer Co*, 223 Mich App 485, 489; 566 NW2d 671 (1996) (noting that expert witnesses were "indispensable" in cases involving the effects of chemical exposure on humans).

Likewise, many Federal circuits require expert testimony in toxic tort cases. For example, in *Pluck v BP Oil Pipeline Co*, 640 F3d 671, 677 (CA 6, 2011), the U.S. Court of Appeals for the Sixth Circuit explained that a plaintiff must establish general and specific causation in toxic tort claims through expert testimony because of the complex scientific assessments required.[1] *Lindley*, *Woodward*, *Nelson*, and *Pluck* reflect courts' recognition that in

[1] See also *Higgins v Koch Development Corp*, 794 F3d 697, 702 (CA 7, 2015) (requiring expert testimony to establish causation where "the typical layperson does not possess the requisite knowledge to draw a causative line" between an injury and its alleged chemical cause); *Wills v*

certain cases, a critical element of a plaintiff's claim—causation—frequently necessitates a scientifically complex causation analysis. Accordingly, a plaintiff cannot be allowed to recover damages without offering testimony from an expert who can interpret technical and scientific concepts for lay jurors, thereby minimizing impermissible guesswork that could wreak havoc on our state's jurisprudence.

Here, the Court of Appeals majority relied heavily on *Genna* in support of its conclusion that Plaintiff did not need to present expert testimony to survive Defendants' motion for summary disposition. In *Genna*, the plaintiff mother and her two small children lived next door to the defendant in a condominium complex, sharing a foundation and walls amongst other things. 286 Mich App at 415. While the defendant was away on vacation for five months, her hot water heater ruptured, infesting both her own condominium and the plaintiff's with mold. *Id.* The children, who had been healthy before the appearance of mold, became seriously ill and did not respond to medical treatment. *Id.* Once the children moved out of the condominium, however, their health began to improve. *Id.* at 416. The mold found in their home was highly toxic, and appeared in levels that were unusually high and unsafe to live amidst—so much so that the condominium was demolished. *Id.* The trial court in that case awarded the plaintiff damages against the defendant, and while the defendant filed motions for JNOV and for a new

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Amerada Hess Corp, 379 F3d 32, 46 (CA 2, 2004) (requiring expert testimony to establish causation where the "causal link between exposure to toxins" and the alleged injury was "sufficiently beyond the knowledge of the lay juror"); *Rink v Cheminova Inc*, 400 F3d 1286, 1297 (CA 11, 2005) ("toxic tort cases … are won or lost on the strength of the scientific evidence to prove causation."); *In re Paoli RR Yard PCB Litigation*, 916 F2d 829, 838 (CA 3, 1990) (noting a plaintiff's toxic tort claim "depend[ed] upon expert testimony pertaining to exposure and causation); *Schnexnayder v Exxon Pipeline Co*, 815 So2d 156, 160 (La App, 2005) (dismissing a toxic tort claim in part because the plaintiff presented no expert testimony to establish medical causation).

trial arguing that plaintiff's failed to present any expert testimony on causation, the trial court denied those motions. *Id.*

The Court of Appeals in *Genna* held that the plaintiff in that case was not required to proffer expert testimony regarding causation because he had presented sufficient evidence of causation in different ways. *Id.* at 420-421. Specifically, the plaintiff demonstrated that there were "massively high levels" of toxins in the plaintiff's condominium, presented expert testimony on the toxicity of mold to humans at the levels observed in the condominium, and presented testimony from a doctor that the plaintiff's children were otherwise healthy before their mold exposure and that their symptoms resolved once they moved out of the house. *Id*.

Genna is readily distinguishable from this case. Unlike the stark proximate and temporal evidence that linked the defendant's conduct to the plaintiff's injuries in *Genna*, here, Plaintiff lived more than ten miles from the oil release point and did not develop his alleged symptoms until more than three weeks after the incident and more than one week after he indicated that the oil smell dissipated. Moreover, unlike the overwhelming evidence of toxin concentration presented in *Genna*, Plaintiff here offered no evidence about his level of exposure to toxic chemicals or VOCs. And in any event, evidence suggested that Plaintiff's alleged injuries were explained by his use of prescription drugs Lamictal and Vicodin. Thus, unlike in *Genna*, where causation could be inferred from the sheer weight of the evidence, here there are multiple competing explanations for Plaintiff's alleged injuries. It was thus imperative that expert testimony be presented precisely because it is must be used to establish causation in scenarios where "an injury has multiple potential etiologies." *Wills*, 379 F2d at 46 (holding expert testimony is required to establish causation where the "causal link between exposure to toxins" and the alleged injury was "sufficiently beyond the knowledge of the lay juror"); see also *Brown*

v Burlington Northern Santa Fe Railway Co, 765 F3d 765 (CA 7, 2014) (affirming summary judgment where the plaintiff offered no reliable expert testimony on causation and such testimony was required when an injury had multiple potential etiologies); *Howell v Centric Group, LLC*, 508 Fed Appx 834 (CA 10, 2013) (affirming summary judgment where the plaintiff offered no expert testimony on causation and such testimony was required when an injury had multiple potential etiologies).

Notwithstanding *Genna*, this Court has not decided whether expert testimony is required to establish causation in a toxic tort case. But many other courts have addressed that issue and most have recognized that, in order to establish causation in a toxic tort case, a plaintiff must present expert testimony. This Court should do the same where the inquiry into causation hinges on scientific, technical, or other specialized knowledge that is outside the common experience and understanding of a jury.

1. Many States Require Expert Testimony to Establish Causation in Toxic Tort Cases

Many states already recognize that complex scientific and medical evidence is necessary to establish the causal link between a plaintiff's alleged exposure to a toxic substance and their injuries, and therefore require testimony from a qualified expert to prove general and specific causation. In fact, some states have established a clear, bright-line requirement for expert testimony to prove causation in all toxic tort cases, while other states have determined that expert testimony is necessary on a case-by-case basis depending on the complexity of the facts and evidence surrounding the plaintiff's alleged injuries. In twelve states, expert testimony is required to establish both general and specific causation in toxic tort litigation.[2] The reason for

[2] In addition to the five examples below, see also *CW ex rel Wood v Textron, Inc*, 807 F3d 827, 838 (CA 7, 2015) ("With no experts to prove causation – be it general or specific – the appellants

these states' requirement of expert testimony is obvious—absent such testimony, a plaintiff cannot demonstrate to the jury that his or her exposure to a toxic substance at a certain level of exposure was sufficient to cause the alleged injury. *Pluck*, 640 F3d at 677.

a. Nebraska

Nebraska law requires expert testimony to establish both general and specific causation in toxic tort cases. In *Barrett v Rhodia, Inc*, 606 F3d 975, 984 (CA 8, 2010), the U.S. Court of Appeals for the Eighth Circuit, applying Nebraska law, noted that "Nebraska courts have clearly and consistently held that expert evidence is required to establish both general and specific causation" in toxic tort cases. In *Barrett*, the court, in light of this requirement, held that because the plaintiff's purported experts were only qualified to testify about the plaintiff's symptoms, and not whether those symptoms were caused by exposure to toxic hydrogen sulfide

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cannot prove their toxic tort case under Indiana law."); *Money v Manville Corp Asbestos Disease Compensation Trust Fund*, 596 A2d 1372, 1377 (Del, 1991) (In Delaware, to establish a "prima facie showing with respect to the cause of an asbestos-related disease, a plaintiff must introduce direct competent expert medical testimony that a defendant's asbestos product was a proximate cause of the plaintiff's injury."); *Sean R ex rel Debra R v BMW of N Am, LLC*, 26 NY3d 801,808; 48 NE3d 937, 941 (2016) (In New York "toxic tort cases, an expert opinion on causation must set forth (1) a plaintiff's exposure to a toxin, (2) that the toxin is capable of causing the particular injuries plaintiff suffered (general causation), and (3) that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries (specific causation)."); *Hudjohn v S&G Mach Co*, 200 Or App 340, 352; 114 P3d 1141 (2005) (In Oregon, "[w]hen the element of causation involves a complex medical question, as a matter of law, no rational juror can find that a plaintiff has established causation unless the plaintiff has presented expert testimony that there is a reasonable medical probability that the alleged negligence caused plaintiff's injuries."); *Downs v Perstorp Component, Inc*, 126 F Supp 2d 1090, 1095 (ED Tenn, 1999) (In Tennessee, "[t]o establish general causation, an expert either performs scientific tests on the chemical to see if it can cause the condition in animals or humans, analyzes the existing scientific literature to determine whether other scientists have performed these tests and what their results were, or both. To establish specific causation, an expert must first complete the general causation analysis and then must establish, at a minimum, qualitative toxicity, dose-response, confounders, and coherence."); *Zellers v NexTech Northeast, LLC*, 553 F Appx 192, 2000 (CA 4, 2013) ("To prove causation in a toxic tort action [under Virginia law], a plaintiff must offer relevant and reliable expert testimony, as the health effects of toxic exposure to chemicals are beyond the knowledge and experience of the average layperson.").

gas, the district court below properly granted summary judgment to the defendant. *Id.* at 984-985.

b. Ohio

Ohio also requires expert testimony to establish general and specific causation in all toxic tort cases. In *Terry v Caputo*, the Ohio Supreme Court held that "[b]ecause claimants failed to provide expert medical evidence relating to the specific cause of their injuries as an element of their mold-exposure claim, the appellate court could not have found that a genuine issue of material fact existed with respect to specific causation." 115 Ohio St 3d 351, 353; 2007 Ohio 5023l 875 NE2d 72 (2007). The court further held that "[e]stablishing general causation and specific causation in cases involving exposure to mold or other toxic substances involves scientific inquiry, and thus causation must be established by the testimony of a medical expert." *Id*. at 356.

c. Arkansas

In Arkansas, a plaintiff in a toxic tort case must establish medical causation through expert testimony. *Nat'l Bank of Commerce v Associated Milk Producers, Inc*, 22 F Supp 2d 942, 949 (ED Ark, 1998). In *National Bank of Commerce*, the court explained that "it is not enough to show that a suspect chemical agent sometimes causes the kind of harm complained of," and therefore excluded the plaintiff's expert testimony because those experts had no scientific knowledge or information as to the level of toxic chemical exposure necessary to cause cancer in humans. *Id.* at 983. The court granted the defendant's motion for summary judgment specifically because the plaintiff offered no admissible expert evidence to establish causation. *Id.* at 984.

d. Iowa

In Iowa, courts emphatically require expert testimony in toxic tort cases. *Junk v Terminix Intern Co*, 628 F3d 439, 450 (CA 8, 2010). In *Junk*, the U.S. Court of Appeals for the Eighth Circuit, applying Iowa law, held that in order for the plaintiff to establish causation in support of her tort claims, she needed to present expert testimony showing that the insecticide compound at issue was the general and specific cause of her newborn's injuries. *Id.* The court held that "expert medical and toxicological testimony is unquestionably required to assist the jury" in proving both types of causation. *Id*.; see also *Ranes v Adams Labs, Inc*, 778 NW2d 677, 688 (Iowa 2010) (requiring toxic tort plaintiffs to provide expert medical and toxicological testimony to satisfy both general and specific causation).

e. Massachusetts

Under Massachusetts law, expert testimony is required to establish both general and specific medical causation in toxic tort cases. *Milward v Rust-Oleum Corp*, 820 F3d 469, 476 (CA 1, 2016). If there is insufficient testimony to establish causation, then judgment as a matter of law is required. *Id.* at 477. In *Milward*, the U.S. Court of Appeals for the First Circuit affirmed the district court's grant of summary judgment in favor of the defendant because the plaintiff offered no admissible expert testimony. *Id.* The Court held that the district court did not abuse its discretion when it found the plaintiff's purported expert unreliable and that her conclusions regarding the plaintiff's injuries from exposure to benzene while working with the defendant's product lacked a scientific foundation. *Id.* at 472.

2. Several States Implicitly Require Expert Testimony to Establish Causation in Toxic Tort Cases

In addition to the twelve states that have a *per se* requirement of expert testimony to establish causation in toxic tort cases, nine states require a plaintiff to proffer expert testimony to establish causation to survive a defendant's motion for summary judgment.[3]

a. Illinois

Under Illinois law, a toxic tort plaintiff must present expert testimony in order to raise a genuine issue of material fact as to the cause of the plaintiff's symptoms. In *Korte v ExxonMobil Coal USA Inc*, 164 F Appx 553, 557-58 (CA 7, 2006), the plaintiffs alleged that the symptoms of which they complained were caused by exposure to coal dust. On appeal, *Korte* concluded that the issue of "whether exposure to coal dust could cause personal injuries is not within the ken of the ordinary person, and thus expert testimony is needed for the Kortes' to prove their case." *Id.* at 557. Without expert testimony, Plaintiffs did not survive summary judgment. *Id.* at 558.

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[3] In addition to the four examples below, see also *McClain v Metabolife Intern, Inc*, 401 F3d 1233, 1237 (CA 11, 2005) (under Alabama law, expert testimony is necessary to prove plaintiff's injury by ingesting Metabolife, but the U.S. Court of Appeals for the Eleventh Circuit held that the plaintiff's expert did not meet the requirements under *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 U.S. 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993) and therefore reversed and remanded the matter); *Hosey v Mediamolle*, 963 So2d 1267, 1269 (Miss Ct App, 2007) (under Mississippi law, the failure of a plaintiff to provide expert testimony to prove causation in a toxic tort case resulted in the dismissal of the case); *Nelson v Nelson*, 2005 MT 263, P37; 329 Mont 85; 122 P3d 1196 (Mont, 2005) (under Montana law, the district court property excluded the testimony of the plaintiff's experts in regard to her exposure to pesticides on the defendant's ranch, and therefore correctly determined that the plaintiff could not succeed in her negligence claim without the ability to establish causation); *Jernee v Kennametal, Inc*, No 60653, 2015 WL 134767, at *1 (Nev Jan 8, 2015) (unpublished) (affirming the lower court's grant of summary judgment to the defendant where the plaintiff failed to offer admissible expert testimony on specific causation of the plaintiff's leukemia from emissions of tungsten carbide with cobalt by the defendant corporation); *Andrews v US Steel Corp*, 149 NM 461, 464; 250 P3d 887 (NM Ct App, 2011) (under New Mexico law, "scientific knowledge of the harmful level of exposure to a chemical, plus knowledge that the plaintiff was exposed to such quantities, are minimal acts necessary to sustain the plaintiff's burden in a toxic tort case.").

b. Pennsylvania

In Pennsylvania, the failure to provide expert causation testimony in a toxic tort case can result in dismissal. In *Duke v Honeywell*, the Philadelphia Court of Common Pleas held that "because Plaintiffs' expert was precluded from testifying at trial following a *Frye* hearing, making it impossible for Plaintiffs to prove causation at trial, summary judgment in favor of [the defendants] was appropriate." 2012 Phila Ct Com Pl LEXIS 122, at *7 (April 16, 2012).

c. Kansas

In Kansas, in order to survive a motion for summary judgment, a plaintiff must offer scientific evidence about general and specific causation. *Maddy v Vulcan Materials Co*, 737 F Supp 1528, 1533 (D Kan, 1990). In *Maddy*, the plaintiff offered only sham testimony from her purported expert witness, which the court barred as unreliable. *Id.* Because the plaintiff offered no reliable expert testimony on either general or specific causation, summary judgment was granted on her personal injury claims. *Id.*

d. Maine

In Maine, where evidence of causation is outside the common knowledge of a lay juror, a plaintiff must present expert testimony to survive summary judgment. *Lund v Bisco Props*, 2010 Me Super LEXIS 70, at *9-10 (Me Super Ct, 2010). In *Lund*, establishing causation required scientific discussion of the presence, amount, type, and toxicity of the mold at issue. *Id.* The plaintiff offered no expert witness on her behalf, absent which the court ruled her evidence was insufficient to support a cause of action in negligence, such that the court granted the defendant's motion for summary judgment. *Id.*

3. Michigan Should Adopt a Similar Standard to States That Require Expert Testimony to Establish Causation in Tort Cases Depending on the Complexity of the Facts and Evidence

In Michigan, it is not necessary for the Supreme Court to go as far as the twenty-one states that have adopted, either explicitly or implicitly, a *per se* rule requiring expert testimony to establish general and specific causation in all tort cases. Rather, Michigan should adopt a standard where expert testimony is required to establish general and specific causation in tort cases when the causal link is at a level of complexity and sophistication beyond the common understanding of a lay juror. Such a standard would adequately protect the interests of plaintiffs who are able to sufficiently establish the requisite causal connection between a defendant's conduct and their alleged harm, while at the same time establishing a minimum threshold that protects defendants from tort claims based on attenuated theories of causation that are outside the common knowledge and understanding of lay jurors. Numerous states have adopted a similar standard.

a. Minnesota

In Minnesota, the need for expert testimony on causation depends on the nature of the question presented. Where the question "involves obscure and abstruse medical factors such that the ordinary layman cannot reasonably possess well-founded knowledge of the matter and could only indulge in speculation in making a finding, there must be expert testimony" that the thing alleged to have caused the result did in fact cause it. *Stahlberg v Moe*, 283 Minn 78, 85; 166 NW2d 340 (1969). In *Stahlberg* the court adopted this standard for expert testimony so courts below would have before them reliable evidence showing causation where inquiries would otherwise be outside the ordinary knowledge of a lay juror. *Id.*

b. Missouri

In Missouri, expert testimony is required in complex litigation involving exposure to a toxic substance when the "cause of sophisticated injuries is not within a layperson's common understanding." *Brown v Seven Trails Inv'rs, LLC,* 456 SW3d 864, 870 (Mo Ct App, 2014). Missouri law allows plaintiffs to claim the "sudden onset doctrine," which does not require expert testimony to prove causation because the circumstances of the plaintiffs' health before and after the incident allow a lay juror to understand the causal link, but "application of the rule depends on the facts of each case" and the rule is generally "applied in cases where a person suffers a broken bone or an open wound immediately after an accident or within a short period of time after the accident." *Id.* In *Brown*, a case involving whether the plaintiffs' injuries occurred as a result of exposure to toxic mold in defendant's apartment, the court stated that since the plaintiffs' injuries allegedly suffered as a result of the mold exposure were very similar to the plaintiff's pre-existing health problems and thus "not readily separable based on common knowledge, this is exactly the type of highly complex case where expert medical testimony is necessary to establish causation." *Id.* The Missouri Court of Appeals held that the plaintiffs' expert testimony regarding their injuries resulting from mold in the apartment was backed by sufficient factual support to create a genuine issue of fact, and therefore reversed the trial court's grant of summary judgment in favor of the defendant. *Id.* at 874.

c. Oklahoma

The Oklahoma Supreme Court requires expert evidence to establish causation in some toxic tort cases. In *Christian v Gray*, the court held, "[w]hen an injury is of a nature requiring a skilled and professional person to determine cause and effect thereof, the scientific question presented must necessarily be determined by testimony of skilled and professional persons." 65 P3d 591, 601–02 (Okla, 2003). Furthermore, "if expert testimony is necessary to show cause of

an injury from exposure to a toxin, the testimony of the expert should reveal a reliable method for determining the quantity of the toxin necessary to cause injuries of the type experienced by plaintiff (general causation), unless plaintiff can show that the circumstances are such that general causation should not be necessary." *Id.* at 607.

d. Rhode Island

Rhode Island courts have held that "expert testimony is required to establish any matter that is not obvious to a lay person and thus lies beyond common knowledge." *Mills v State Sales, Inc*, 824 A2d 461, 467 (RI, 2003). In *Mills*, the plaintiffs alleged that the defendant's negligence in conducting environmental testing for toxins at her office resulted in the plaintiff's injuries. The court stated, "[f]urther, we do not hesitate to conclude that the existence of a causal relationship between a particular toxin and its effect on the human body would have to be established through expert testimony." *Id.* The court held, "[w]ithout providing an expert's affidavit or other appropriate scientific evidence, there was no evidence capable of substantiating plaintiff's claim that [the defendant's] alleged negligence proximately caused her injuries." *Id.* Therefore, the defendant was entitled to summary judgment.

e. South Dakota

In South Dakota, workers' compensation cases require expert testimony to establish causation "because the field is one in which laymen ordinarily are unqualified to express an opinion." *Day v John Morrell & Co*, 490 NW2d 720, 724 (SD 1992). Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability. *Id.* The Supreme Court of South Dakota requires expert testimony in these situations because judgments in tort cases "cannot be based on possibilities or probabilities," but rather must be based on sufficient evidence. *Id.* In *Day*, the court affirmed a judgment against a plaintiff who presented

no expert testimony that her carpal tunnel syndrome was aggravated by her employment. *Id.* at 725.

f. South Carolina

In South Carolina, "[w]here a medical causal relation issue is not one within the common knowledge of the layman, proximate cause cannot be determined without expert medical testimony" in toxic cases. *Goewey v United States*, 886 F Supp 1268, 1279 (D SC, 1995). Plaintiffs in South Carolina are also required to provide sufficient expert testimony to show that the result "most probably" came from the cause alleged. *Clark v Greenville County*, 313 SC 205, 208; 437 SE2d 117 (1993). Because the plaintiffs in *Goewey* presented multiple experts that contradicted each other on essential points, the plaintiffs failed to carry their burden on causation and their case was dismissed. *Goewey*, 886 F Supp at 1282.

g. Texas

The Texas Court of Appeals has held that, because the complexity of the claims in a toxic tort case fell "outside a lay person's general knowledge and experience," causation must be proven by expert testimony. *Cerny v Marathon Oil Corp*, 480 SW3d 612, 620 (Tex Ct App, 2015). The court held, "Causation cannot be established by mere speculation. . . . To overcome the defendants' no-evidence summary judgment motion on causation, the [Plaintiffs] had to present more than a scintilla of expert evidence that emissions from a Marathon and/or Plains facility caused their injuries and property damage..." *Id.* at 622.

h. Alaska

In Alaska, expert testimony is necessary when "the nature or character of a person's injuries require[s] the special skill of an expert to help present the evidence to the trier of fact in a comprehensible format." *Choi v Anvil*, 32 P3d 1, 3 (Alas, 2001). In *Choi*, the court did not require expert testimony on causation from a plaintiff who had been rear-ended in a car accident,

because the situation was "easily understood by a jury." *Id.* The court determined that the jury could, using "everyday experience," readily find a causal relationship between the collision and the plaintiff's "relatively common injuries" of neck pain and stiffness. *Id.* The court stated that "where alleged injuries are of a common nature and arise from a readily identifiable cause," there is no need to require expert testimony. *Id.* But this situation is distinguished from situations where expert testimony is required to "establish a causal connection … where there is no reasonably apparent" explanation absent expert testimony supporting causation. *Id.*

i. Arizona

In Arizona, whenever the cause of an injury is not clearly apparent to a layman, causation can only be established by expert medical testimony. *Waller v Industrial Commission*, 99 Ariz. 15, 20; 406 P2d 197 (1965). In *Waller*, an employee claimed he suffered injuries to his back, shoulder, and neck while on the job. *Id.* at 18. After being awarded minimal medical benefits by a workplace injury commission, the employee challenged his award seeking higher benefits. The court affirmed the commission's award finding that the plaintiff's expert's attempts to establish causation had failed. *Id.*

j. Idaho

In Idaho, "[a]lthough expert testimony is not expressly required to establish causation in medical malpractice cases, such testimony is often necessary given the nature of the cases." *Easterling v Kendall*, 159 Idaho 902; 367 P3d 1214, 1226 (2016). Expert testimony is required when "the causative factors are not ordinarily within the knowledge or experience of laymen composing the jury." *Id.* In *Easterling*, the Supreme Court of Idaho affirmed a lower court that ruled that expert testimony was required to establish causation in a medical malpractice case involving the diagnosis and treatment of a carotid artery dissection, because a jury was not qualified to evaluate the causative factors involved. *Id.* at 1227.

k. New Hampshire

In New Hampshire, "expert testimony is required … to aid the jury whenever the matter to be determined is so distinctly related to some science, profession, business, or occupation as to be beyond the ken of the average layman." *Estate of Joshua T v State*, 150 NH 405, 408; 840 A2d 768 (NH, 2003). In *Joshua T*, the Supreme Court of New Hampshire stated that "if any inference of the requisite causal link must depend [upon] observation and analysis outside the common experience of jurors," expert testimony is required to "preclude the jury from engaging in idle speculation." *Id.* Lay testimony is only sufficient to establish causation when the "cause and effect are so immediate, direct, and natural to common experience as to obviate any need for an expert medical opinion. *Id.* In *Joshua T*, the court determined that suicide was sufficiently outside of the layperson's experience as to require expert testimony to survive a motion for summary judgment, and because the plaintiff offered no expert testimony that the decedent child's placement in foster care caused his suicide, the court affirmed the lower court's grant of summary judgment against the plaintiff. *Id.* at 409.

l. North Dakota

In North Dakota, expert testimony is sometimes required if "the issue is beyond the area of common knowledge or lay comprehension or the issue is not within the ordinary experience of the jurors," such as in medical negligence cases. *Klimple v Bahl*, 2007 ND 13, P6; 727 NW2d 256, 259 (ND, 2007) (internal citations omitted). In *Klimple*, the plaintiff claimed that his Kienbock's disease was aggravated by a car crash, but made no argument that this causal relationship was within the common knowledge or comprehension of a layperson. *Id.* As such, the Supreme Court of North Dakota ruled he needed to present expert medical testimony to establish proximate cause, which he had not done, and therefore sustained a grant of summary judgment against him. *Id.*

m. Utah

In Utah, expert testimony may be required when there are multiple competing explanations for an injury, as in the situation of apportioning responsibility for an injury between multiple actors. *Harris v Shopko Stores, Inc*, 308 P3d 449, 458-459 (UT, 2003). In *Harris*, the Supreme Court of Utah required expert testimony in an apportionment dispute involving a store's negligent act and a plaintiff's preexisting condition, because "[w]here apportionment depends on the competing causal influences of a defendant's negligence and a pre-existing medical condition … common experience is a poor substitute for expert guidance." *Id.* at 459. The court stated that "the average lay juror is ill-equipped to sift through complicated medical evidence and to come to a non-speculative apportionment decision." *Id.* The court affirmed the grant of a new trial for the plaintiff, concluding that a jury instruction on apportionment that did not require expert testimony from the defendant on causation was erroneous. *Id.*

n. Washington

In Washington, expert testimony is required to establish causation in cases "where the nature of the injury involves obscure medical factors which are beyond an ordinary layperson's knowledge, necessitating speculation in making a finding." *Riggins v Bechtel Power Corp*, 44 Wn App 244, 254; 722 P2d 819 (1986). This is opposed to situations where "the results of an alleged act of negligence are within the experience and observation of an ordinary layperson" and therefore expert testimony is not required. *Id.* The court in *Riggins* ruled that the plaintiff needed to present expert testimony about her alleged hip pain and headaches after an accident on a construction site, and because she did not, a new trial was required. *Id.* at 255.

o. Connecticut

Connecticut courts generally require plaintiffs to provide sufficient expert testimony to satisfy their burdens of proof. "Expert medical opinion evidence is usually required to show the

cause of an injury or disease because the medical effect on the human system of the infliction of injuries is generally not within the sphere of the common knowledge of the lay person." *Shegog v Zabrecky*, 36 Conn App 737, 745-47; 654 A2d 771 (1995). An expert opinion is generally required in professional competence and malpractice cases. *Id*. at 746. *Shegog* also noted a few rare exceptions to this evidentiary requirement. "An exception to the general rule with regard to expert medical opinion evidence is when the medical condition is obvious or common in everyday life." *Id*. at 746-47, citing *State v Orsini*, 155 Conn 367, 372; 232 A2d 907 (1967). The court further recognized that expert opinions may be unnecessary where the plaintiff's other causation evidence creates a probability so strong that a lay jury can form a reasonable belief." *Shegog*, 36 Conn App at 747, citing *Gannon v Kresge Co*, 114 Conn 36, 38; 157 A 541 (1931).

p. District of Columbia

District of Columbia law requires expert testimony in toxic tort cases "where the parties offer competing causal explanations for an injury that turns on scientific information" outside the common knowledge of the average lay juror. *Arias v DynCorp*, 410 US App DC 62, 67 (2014). In *Arias*, the U.S. Court of Appeals for the D.C. Circuit, applying District of Columbia law, upheld the district court's requirement that plaintiffs provide "expert testimony … to determine whether the specific herbicide at issue was causing the specific kinds of injuries complained of." *Id.* The Court held that the district court did not abuse its discretion in dismissing the plaintiffs' claims for crop damages because they "failed to provide expert testimony demonstrating 'general causation,'" as required when competing causal explanations turn on complex information. *Id*.

B. Plaintiff in this Case Did Not Sufficiently Establish Causation to Avoid Summary Disposition under MCR 2.116(C)(10)

Here, Plaintiff relied on the testimony of Dr. Jerry Nosanchuk to establish causation between the oil incident and his alleged injuries, but his testimony is fatally speculative. Dr.

Nosanchuk testified that fumes from the oil spill were the sole cause of Plaintiff's injuries without reviewing any of the available air monitoring results or sampling data gathered, including samples taken from the vicinity of Plaintiff's home. Dr. Nosanchuk presented no evidence that Plaintiff was actually exposed to the specific VOCs found in crude oil or that he was exposed at levels sufficient to cause his alleged injuries, and in fact freely admitted that he did not know anything about Plaintiff's potential exposure to VOCs. Furthermore, when asked to supply the basis for his belief that the sole cause of Plaintiff's injuries was the spill, Dr. Nosanchuk testified only that he understand that there were VOCs "in the water" and that Plaintiff smelled oil. This testimony is further undermined by Dr. Nosanchuk's not knowing (1) where the oil release site was, (2) the emission rates of the VOCs found in crude oil, (3) where Plaintiff lived in relation to the release site, and (4) what being able to smell oil means for exposure to toxic chemicals and VOCs. Confronted with the information that Plaintiff was taking Lamictal and Vicodin at the time of the complained injuries, Dr. Nosanchuk simply ignored this information, even where Plaintiff himself thought Vicodin was the cause of his vomiting. Dr. Nosanchuk also failed to rigorously consider any potential other causes of Plaintiff's alleged injuries, significantly damaging the strength of his ultimate conclusion. Courts require expert testimony to establish causation to prohibit this sort of baseless speculation lacking a foundation in science.

In addition, Dr. Nosanchuk's testimony fails to meet the reliability requirements of MRE 702 and MCL 600.2955, which charge courts with investigating the voracity and scientific foundation of proffered expert testimony. Dr. Nosanchuk admitted that he had no expertise regarding the medical effects of exposure to toxic chemicals and VOCs, and that his practice is limited to the treatment of routine medical conditions. Dr. Nosanchuk essentially admitted that

he was not qualified to offer expert testimony regarding the cause of Plaintiff's injury, as he testified during his deposition that he did not "really understand the toxicology" and "wouldn't have any idea" of the chemical exposure necessary to cause Plaintiff's injuries.

In sum, Plaintiff's reliance on Dr. Nosanchuk's speculative and unreliable testimony is insufficient meet Plaintiff's burden of establishing a genuine issue of material fact concerning whether the oil spill caused his injuries. The Court of Appeals erred in holding otherwise.

V. CONCLUSION

As federal and state courts have recognized across the country, expert testimony is required to establish causation in toxic tort cases because the link between exposure to toxic substances and alleged injuries is outside the common understanding of a jury. Michigan should do the same; as a predicate to surviving a motion for summary disposition, plaintiffs should be required to present expert testimony establishing general and specific causation.

Because Plaintiff failed to present that testimony in this case, the Chamber respectfully requests that the Court reverse the decision of the Court of Appeals, reinstate the circuit court's grant of summary disposition in favor of Defendants, and hold that expert testimony is required to establish causation in toxic tort cases where complex facts make causation a scientific inquiry outside the common knowledge of a lay juror.

Respectfully submitted,

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Dated: August 29, 2016